Supreme Court, U.S.
FILED
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92-327

No. _____

IN THE

SUPREME COURT
OF THE UNITED STATE

October Term, 1992

JACK DAVID KELLY, Individually and
JACK DAVID KELLY, as President/Shareholder of
MAPLE LEAF DEVELOPMENT CORPORATION,
Petitioner,

versus

TREE FARM DEVELOPMENT CORPORATION; EMORY O. WILLIAMS, JR.; GEORGE G. PHILLIPS, JR.; E. D. BOB PIERCE; and THE ESTATE OF ABRAHAM L. PIERCE,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATE SUPREME COURT

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Attorney for Petitioner

JACK DAVID KELLY
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(904) 438-4785
Petitioner

QUESTIONS PRESENTED FOR REVIEW

A. WHETHER THE FLORIDA COURT IMPROPERLY TRANSFERRED A COMPLAINT TO SET ASIDE A MERGER TO ANOTHER JURISDICTION.

B. WHETHER THE FLORIDA SUPREME COURT IMPROPERLY DECLINED TO HEAR PETITIONER'S APPEAL CITING ITS REASON AS LACK OF JURISDICTION.

C. WHETHER THE FLORIDA COURT ERRONEOUSLY APPLIED THE LOCAL ACTION RULE TO PETITIONER'S COMPLAINT THEREBY TRANSFERRING HIS ACTION TO ANOTHER JURISDICTION NOT OF PETITIONER'S CHOICE.

D. WHETHER THE ACTIONS OF THE FLORIDA COURTS HAVE DEPRIVED PETITIONER OF HIS RIGHTS WITHOUT DUE PROCESS OF LAW IN VIOLATION OF THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION.

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OPINIONS IN THE CASE BELOW

The lower courts have not issued a written opinion other than the District Court of Appeal, First District, State of Florida's Opinion, Per Curium Affirmed (A-1) and the Opinion of the Florida Supreme Court's Opinion declining jurisdiction (A-2).

STATEMENT AS TO JURISDICTION

Pursuant to 28 U.S.C. and Rule 10.1, the Supreme Court has discretionary power to review Final Orders of a State's highest court of last resort that has deprived an individual of his rights guaranteed by the United States Constitution.

The decree sought to be reviewed was entered March 10, 1992, by The Supreme Court of Florida denying jurisdiction to review the Per Curium Affirmed decision by the District Court of Appeal, First District, State of Florida, entered November 7, 1991, together with the denial of Petitioner's Motion for Rehearing entered December 19, 1991.

The Court has granted two extensions of time within which to filed the Petition for a Writ of Certiorari which are dated June 11, 1992, and July 13, 1992.

CONSTITUTIONAL PROVISIONS INVOLVED

Pursuant to 28 U.S.C. and Rule 10.1, the Supreme Court has discretionary power to review Final Orders of a State's highest court of last resort that has deprived an individual of his rights guaranteed by the United States Constitution.

The decree sought to be reviewed was entered March 10, 1992, by The Supreme Court of Florida denying jurisdiction to review the Per Curium Affirmed decision by the District Court of Appeal, First district, State of Florida, entered November 7, 1991, together with the denial of Petitioner's Motion for Rehearing entered December 19, 1991.

The Court has granted two extensions of time within which to filed the Petition for a Writ of Certiorari which are dated June 11, 1992, and July 13, 1992.

I. STATEMENT OF THE FACTS

On August 2, 1992, Petitioner, hereinafter referred to as Maple Leaf, filed in Leon County, Florida Circuit Court, and amended complaint against Respondent, hereinafter referred to as Tree Farm, seeking to set aside a purported merger between Maple Leaf and Tree Farm. (A-3)

Maple Leaf contends in its complaint that a merger did not take place due to failure of conditions that were required to occur before merger could take place.

Various motions were filed by Tree Farm seeking transfer of Maple Leaf's complaint. No answer was filed to Maple Leaf's complaint.

A hearing was conducted in Leon County, Florida on Tree Farm's Motion to Dismiss for Lack of Subject Matter Jurisdiction and to abate or in the alternative transfer for improper venue. (A-4)

On March 12, 1991, the Leon County Court entered its order improperly transferring Maple Leaf's case to the Circuit Court of Escambia County, Florida, stating in paragraph one of its order

> 1. This action involved a claim by the Plaintiff which in substance relates to the Plaintiff's claim to title of certain real property situate in Escambia County, Florida. Since the actions is, therefore, a "local action" it should have been filed in Escambia County, Florida.

(A-5)

From this action by the lower court Maple Leaf appealed to the District Court of Appeal, First District, State of Florida, arguing that the complaint for relief filed in the lower court did not involve the subject matter of real property but involved the subject matter of merger and, therefore, the action should not have been transferred to the Circuit Court of Escambia County, Florida.

The District Court of Appeal, First District, State of Florida, Affirmed the lower court's Opinion on November 7, 1991.

Petitioner timely filed his Motion for Rehearing (A-6). This Motion for Rehearing was denied on December 19, 1991.

Petitioner filed his appeal to the Florida Supreme Court along with his Motion to Accept Jurisdiction, arguing that the lower court's actions have deprived him of his rights to due process of law. (A-7)

On March 10, 1992, the Supreme Court of Florida did not accept jurisdiction and from this decision Petitioner is seeking review by the United States Supreme Court in that the lower court's actions are depriving Petitioner of his rights without due process of law.

II. ARGUMENT FOR GRANTING THE WRIT

The Supreme Court man grant a Writ of Certiorari when a state court violated its citizen of their rights under the United States Constitution. The instant case presents such a questions.

Based on the facts presented below, Petitioner humbly and sincerely prays and asks the Supreme Court to accept certiorari and grant Petitioner the honor of having the highest court in the Country redress the improper treatment of his case in the Florida courts.

The Congress shall make no law abridging the right of the people to petition the government for redress of grievances. The people have the right to petition the governments without intervention or prohibition by the authorities.

From as early as Thomas Jefferson's writings, citizens have been protected in their right to petition against the governments oppression.

Due process of law is another descriptive name for legal, judicial and governmental fair play in dealing with their citizens.

Petitioner filed his original Petition/Complaint (A-3) to set aside a merger n Tallahassee, Florida, where the merger that Petitioner was seeking to set aside was alleged to have taken place. The subsequent transferring of the case to another jurisdiction just because real property was incidentally involved has deprived Petitioner of his rights to redress his grievance in the form that he chooses.

Petitioner has the right to seek redress of the wrong complained of in the court where the action was originally filed, Leon County, Florida, and this right cannot be taken away from him by the erroneous labeling of Petitioner's complaint as a complaint involving real property when in fact it was a complaint involving the setting aside of a merger.

Maple Leaf's amended complaint for declaratory relief filed in the lower court did not involve the subject matter of real property but involved the subject matter of merger. The amended complaint alleged that conditions precedent to a merger of Maple Leaf and Tree Farm did not occur and therefore a merger of the two corporation, Maple Leaf and Tree Farm, did not come into existence. The amended complaint simply demands that the court declare andy purported merger of the two corporation to be null and void and to continue the separate existence of Maple Leaf as if a merger had not occurred.

Paragraph one of Judge Hall's Order states that:

> 1. This action involves a claim by the Plaintiff which in substance relates to the Plaintiff's claim to title of certain real property situate in Escambia County, Florida.

(A-5)

This assessment of Petitioner's claim is absolutely contrary to every allegation in the complaint.

There are many rights, privileges, responsibilities that do come into existence once the issue of merger has been determine, however, these rights, privileges and responsibilities are not disputed in the complaint and will be automatically resolved by resolution of the merger issue.

Petitioner was initially informed by the Department of State, State of Florida that he must obtain a court order advising the Department of State, to "unfile" the merger. (A-8) Petitioner, in accordance with the Department of State's instruction, retained his attorney in Leon County, Florida seeking to set aside the merger.

It is the prerogative of Maple Leaf to select where his case shall be heard, so long as selection is one of the alternatives provided by the Florida Statutes. The selections should not be disturbed. Basswood v. Talquin Elec. Coop., 362 So. 2d 357 (Fla. ___ DCA 1978).

The local action rule in Florida does not apply to determine the forum where the litigation involved the recision of a contract for merger and merger of two corporations. The complaint of Petitioner is not to determine the question of title to land.

Equitable actions can be maintained in any jurisdiction where venue lies even though the suit will affect lands not within the territorial jurisdiction of the court. Singer v. Tobin, 201 So. 2d 799 (Fla. 3rd DCA 1967).

The Complaint filed by Maple Leaf is primarily a complaint to strip Tree Farm of their rights to a merger they could have acquired by the merger agreement if fraud had not taken place. The fact that the action will impact by operation of law on title to land does not cause the case to be transferred to where the land is located. Royal v. Parado, 462 So. 2d 849 (Fla. 1st DCA 1985). Also see letter dated October 29, 1990. (A-9)

Another approach florida courts have taken in coming to a fair resolution of whether or not to transfer an action where the land is located is to ask the question of whether or not there is property/real estate in litigation? If real property is not in litigation" then the local action rule would not apply. Green v. A.G.B.B. Hotels, Inc., 305 So. 2d 666 (Fla. 5th DCA 1987).

In Petitioner's case real property is clearly not in litigation; however merger is. A property issue will be resolved automatically by operation of law once the merger issue is determined.

The above sequence of events and treatment of Petitioner's complaint demonstrates that this Court must intervene so that Petitioner will be able to have his grievance addressed in the proper court of his choosing. To deny Petitioner his right to bring his action before the Leon County, Florida Court because of mislabeling of the complaint denies him of his right to due process of law guaranteed by the Fourteenth Amendment of the United States Constitution.

III. CONCLUSION

This Court has the power to allow Petitioner his right to have his grievance addressed in the proper court and thereby guarantee him the protection of his Constitutional rights. Petitioner humbly and sincerely prays that this Court will permit him to present his case before the highest court in the country.

Respectfully submitted,

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(904) 432-7001
Attorney for Petitioner

JACK DAVID KELLY
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Pensacola, Florida 32503
(904) 438-4785
Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Petition for wait of Certiorari and appendix has been furnished to Phillip A. Bates, Esquire, 125 West Romana Street, Suite 800, Post Office Box 13010, Pensacola, Florida, 32501; Stephen R. Moorehead, Esquire, 700 South Palafox Street, Suite 3C, Pensacola, Florida 32501; Carl R. Pennington, Esquire, 3375 Capitol Circle, Post Office Box 13527, N. E. Tallahassee, Florida 32317; Emory O. Williams, Esquire, 306 Third Lane, Palm Beach Gardens, Florida, 33410; Estate of George G. Phillips, Jr., Esquire, _____, by U.S. Mail this 23 day of July, 1992.

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No. _____

IN THE

SUPREME COURT
OF THE UNITED STATE

October Term, 1992

JACK DAVID KELLY, Individually and
JACK DA' ID KELLY, as President/Shareholder of
MAPLE LEAF DEVELOPMENT CORPORATION,
Petitioner,

versus

TREE FARM DEVELOPMENT CORPORATION; EMORY O. WILLIAMS, JR.; GEORGE G. PHILLIPS, JR.; E. D. BOB PIERCE; and THE ESTATE OF ABRAHAM L. PIERCE,

Respondent.

SUPPLEMENTAL APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA

JACK D. KELLY, Appellant, v. TREE FARM DEVELOPMENT CORP., et al., Appellees.	NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF FILED. CASE NO. 91-1185

Opinion filed November 7, 1991.

An Appeal from the Circuit Court for Leon County.
J. Lewis Hall, Jr., Judge.

Burton E. Strubhar, Pensacola, for Appellant.

Carl R. Pennington, Jr. and Cathi C. Wilkinson of Pennington, Wilkinson, Dunlap, Bateman and Camp, P.A., Tallahassee, for Appellee Tree Farm Development Corp.

Phillip A. Bates of Clark, Partington, Hart, Larry, Bond, Stackhouse & Stone, Pensacola, for Appellee E. D. "Bob" Pierce.

Emory O. Williams, Jr., West Palm Beach, for Appellee Estate of Emory O. Williams.

Stephen R. Moorhead of McDonald, Fleming & Moorhead, Pensacola, of Appellee Estate of Abraham L. Pierce.

PER CURIAM.

AFFIRMED.

JOANOS, C.J., and SMITH and ALLEN, JJ. CONCUR.

SUPREME COURT OF FLORIDA

MONDAY, JANUARY 27, 1992

JACK D. KELLY, Appellant,	* * * *	CASE NO. 79,254
v.	* *	DISTRICT COURT OF
Tree Farm Development Corporation, ET AL., Appellees.	* * * *	APPEAL, 1ST DISTRICT - NO. 91-1185

It appearing to the Court that the District Court of Appeal, First District, did not declare invalid a State Statute or a provision of the State Constitution, and that, therefore, it is without jurisdiction, this appeal is hereby dismissed subject to reinstatement if jurisdiction is established on proper motion filed within fifteen (15) days from the date of this order. See Article V, Section 3 (b) (1), Florida Constitution.

H

cc: Hon. Jon S. Wheeler, Clerk
Hon. Paul Hartsfield, Clerk
Hon. J. Lewis Hall, Jr., Judge

Burton E. Strubhar, Esquire
Albert C. Penson, Esquire
Emory O. Williams, Jr., Esquire
Carl R. Pennington, Esquire
Stephen Moorhead, Esquire
Phillip A. Bates, Esquire

[Seal]
Supreme Court
of the State of
Florida

IN THE CIRCUIT COURT FOR THE
SECOND JUDICIAL CIRCUIT, IN
AND FOR LEON COUNTY, FLORIDA

Case No: 90-3378

JACK D. KELLY, individually
and JACK D. KELLY as President/
Shareholder of Maple Leaf
Development Corp.,

Plaintiff,
vs.

TREE FARM DEVELOPMENT CORP.;
EMORY O. WILLIAMS, JR., GEORGE
G. PHILLIPS, JR., E.D. BOB
PIERCE; and the Estate of
ABRAHAM L. PIERCE,
Defendants.

AMENDED
COMPLAINT

COMES NOW Plaintiff, JACK D. KELLY, individually ("Kelly"), and JACK D. KELLY as President/Shareholder of Maple Leaf Development Corp. ("Maple Leaf"), and sues Defendant, TREE FARM DEVELOPMENT CORP. ("Tree Farm"); EMORY O. WILLIAMS, JR. ("Williams"); GEORGE G. PHILLIPS, JR. ("Phillips"); E. D. BOB PIERCE ("B. Pierce"); and the Estate of ABRAHAM L. PIERCE ("A. Pierce"), and as grounds therefore, states:

GENERAL ALLEGATJONS

1. This is an action for declaratory judgement pursuant to Chapter 86, Fla. Stat.

2. Kelly is a resident of Escambia County, Florida and at, all times material hereto, was a shareholder, sole owner and President of Maple Leaf, a Florida corporation.

3. At all times material hereto, Maple Leaf is a Florida corporation, conducting business throughout the State of Florida.

4. At all times material hereto, Defendant, Tree Farm is a Delaware corporation, authorized to do business in the State of Florida with its principal place of business in Jacksonville, Florida. At all times material hereto, Tree Farm conducted business in Leon and Escambia County, Florida.

5. Williams is a resident of Palm Beach Gardens, Florida and was a former director of Maple Leaf, who may claim some right or interest in Maple Leaf.

6. Phillips is a resident of Escambia County, Florida and was a former director of Maple Leaf, who may claim some right or interest in Maple Leaf.

7. B. Pierce is a resident of Escambia County, Florida and was a former director of Maple Leaf, who may claim some right or interest in Maple Leaf.

8. At all times material hereto, A. Pierce was resident of Escambia County, Florida and was a former director of Maple Leaf. A. Pierce died October30, 1987 and Stephen R. Morelead of Escambia County, was appointed as Personal Representative (Case No. 88-82CT-03, Division D). The Estate of A. Pierce may claim some right or interest in Maple Leaf.

9. On about March 17, 1971, Maple Leaf executed a Purchase Agreement with Barnett Bank of Pensacola, formerly The First Bank & Trust Co. of Pensacola, for certain property located in Escambia County, Florida more particularly described in the deed for said property, issued on July 1, 1971. (See Composite Exhibit "A" attached and incorporated herein.)

10. On about July 1, 1971, Maple Leaf Mortgaged to Barnett Bank of Pensacola the above-described real property located in Escambia County, Florida. (See Exhibit "B" attached hereto and incorporated herein.)

11. The mortgage was guaranteed by Kelly, Williams, Phillips, B. Pierce and A. Pierce.

12. This cause of action accrued in Leon County, Florida,

upon the filing of the Agreement of Merger between Maple Leaf and Tree Farm on February 1, 1972, in the office of the State of Florida, Department of State. (See Composite Exhibit "C" attached in incorporated herein.)

13. The Agreement of Merger, entered in on January 18, 1972, provided that Maple Leaf would merge into Tree Farm and that Tree Farm would be the surviving corporation.

14. Upon the merger of the two corporations, each share of Maple Leaf stock was to be converted into 47.619 shares of Class B stock of Tree Farm.

15. At the date of merger, Kelly would hold 1,238 shares of Tree Farm stock.

16. Pursuant to the terms of the Agreement of Merger, each shareholder of Maple Leaf was to receive its Tree Farm shares upon surrender of shares of Maple Leaf and the parties entered into additional agreements to structure the purchase of the shares.

17. Pursuant to the terms of the Agreement of Merger the agreement could not be effective until the date upon which the last act required to complete the merger under the laws of Florida and Delaware was performed. (See Article "Fourth" (c).)

18. Pursuant to the terms of the Agreement of Merger, title to real property of Maple Leaf did not vest in Tree Farm until the merger became effective. (See Article "Fourth" (d).)

19. Florida Stat. §608.041(2) (1972), provided that the effective date of merger may be specified in the agreement of merger, but in no event could the effective date be prior to, or more than ninety (90) days after filing the Agreement of Merger.

20. On about May 27, 1971, prior to entering the Agreement of Merger, Maple Leaf assigned eighty-four (84) shares of stock (all of its outstanding stock) to Pensacola Loan & Savings Bank as security for a loan in the amount of $60,090.15. (See Exhibit "D" attached and incorporated herein.)

21. On about January 25, 1972, just preceding the merger of the corporations, Kelly, Williams, Phillips, B. Pierce and A. Pierce, all of Maple Leaf, executed a Security Agreement with Pensacola Loan & Savings Bank pledging such shares of common stock in Tree Farm as they may have issued to them as security for the loan to Maple Leaf, described in paragraph 20

above. (See Exhibit "E" attached and incorporated herein.)

22. Upon the effective date of the merger, Maple Leaf and its shareholders were unable to exchange their shares of Maple Leaf stock and did not do so within 90 days of the date upon which the Agreement of Merger was filed.

23. Pursuant to Fla. Stat. §608.22 (1972), upon merger of the corporation, all property owned by Maple Leaf would become the property of Tree Farm, however, Barnett Bank's mortgage was unimpaired by the merger.

COUNT I

24. Paragraphs 1-23 are realleged as if set forth herein.

25. There currently exists an actual controversy between the parties arising out of the merger of Maple Leaf and Tree Farm.

26. The terms of the Agreement of Merger as controlled by Fla. Stat. §608.041, provided that the last act to effectuate the merger should have occurred within ninety (90) days of the filing of the Agreement of Merger.

27. The condition precedent to the merger of Maple Leaf and Tree Farm did not occur.

28. Tree Farm has not obtained title to the property owned by Maple Leaf.

29. On about November 14, 1977, Barnett Bank of Pensacola, issued a deed to Tree Farm for a portion of the property previously conveyed to Maple Leaf, excluding and reserving an interest in all oil, gas or mineral royalties derived from the property. (See Exhibit "F" attached and incorporated herein.) Title to the subject property remains in the name of Maple Leaf.

30. At the time of the conveyance to Tree Farm, Maple Leaf had not divested itself of its interest in the property.

31. Kelly, individually, as original owner of Maple Leaf and as President and shareholder of Maple Leaf, has filed and recorded several instruments, documenting Maple Leaf's continued interest in the real property owned. (See Composite Exhibit "G" attached and incorporated herein.)

32. Williams, Phillips, B. Pierce and A. Pierce may all, or each, claim some right or claim in Maple Leaf. Any such claim

is null and void and is otherwise inferior to the claim of Kelly.

33. Williams, Phillips, B. Pierce and A. Pierce each received an interest in Maple Leaf, conditioned upon consideration which included the assumption and satisfaction of Maple Leaf's obligations and of providing services to and on behalf of Maple Leaf. Each failed to satisfy said obligations and to provide the required services.

34. Williams, Phillips, B. Pierce and A. Pierce each guaranteed payment of the sales agreement between Barnett Bank and Maple Leaf.

35. Phillips was required, as a condition to the purchase of stock from Kelly, to pay all obligations to Pensacola Loan & Savings Bank (and others). (See Exhibit "H" attached and incorporated herein.)

36. Williams, Phillips, B. Pierce and A. Pierce failed to perform their respective services and obligations, including satisfaction of the obligations to Pensacola Loan & Savings Bank and Barnett Bank. (See Exhibit "I" attached and incorporated herein.)

37. Kelly and Maple Leaf require a declaration of their respective right to declare the merger null and void and to continue the separate existence of Maple Leaf as if the merger had not occurred.

38. Fla. Stat. §86.031 authorizes the construction of written instruments by declaratory judgment.

39. All parties who may claim an interest in this action are before the court.

WHEREFORE, Plaintiffs request this court:

A. Take jurisdiction of the parties hereto and the subject matter of this action.

B. Declare the respective rights of the parties to the Agreement of Merger and enter its order declaring the merger ineffective and allowing Maple Leaf to maintain its separate existence as if the merger had not occurred.

COUNT II

40. Paragraphs 1-23 are realleged as if set forth herein.

41. Kelly and Maple Leaf have filed and recorded several instruments demonstrating a claim of title to the property. (See Composite Exhibit "G"). Plaintiff's claim of title is valid.

42. Title to the property has not vested in Tree Farm.

43. Tree Farm, through the Articles of Merger and through the subsequent deed, claims adverse title to the subject property.

44. Tree Farm's claim of title is invalid in that the previously described conditions precedent to the merger of Maple Leaf and Tree Farm never occurred.

45. Tree Farm has no valid claim of title to the property.

46. Kelly and Maple Leaf remain ready, able and willing to do equity with regard to obtaining title to the property.

47. The rights of Kelly and Maple Leaf are superior to the claims of Tree Farm.

48. The parties require a declaration as to their respective rights and interests in the subject property.

49. All parties having an interest in this action are before the court.

WHEREFORE, Plaintiffs request this court declare the respective rights of the parties to the subject property and enter its order declaring the property to be titled in Kelly and Maple Leaf.

DATED this _____day of September, 1990.

Respectfully submitted

/S/

Albert C. Penson
Fla. Bar ID: 334510
Hilton, Hilton, Kolk & Penson
Post Office Box 1327
Tallahassee, Florida 32302
(904) 561-8000

Attorneys for Plaintiff

IN THE CIRCUIT COURT FOR THE SECOND JUDICIAL CIRCUIT IN AND FOR LEON COUNTY, FLORIDA

JACK D. KELLY, INDIVIDUALLY; AND JACK D. KELLY AS PRESIDENT/SHAREHOLDER OF MAPLE LEAF DEVELOPMENT CORP.,

PLAINTIFFS,

VS. CASE NO. 90-3398

TREE FARM DEVELOPMENT CORP. EMORY O. WILLIAMS, JR.; GEORGE G. PHILLIPS, JR.; E. D. BOB PIERCE; AND THE ESTATE OF ABRAHAM L. PIERCE.

DEFENDANTS.

_____/

MOTION TO DISMISS
FOR LACK OF JURISDICTION OF THE SUBJECT MATTER

COMES NOW the Defendant, E. D. Bob Pierce, by and through his undersigned attorneys, pursuant to Rule 1.140 (b), Florida Rules of Civil Procedure, and in support hereof further says:

1. The Plaintiffs' Amended Complaint seeks a declaration with respect to the fights of the parties to certain real property situate in Escambia County, Florida.

2. Since this action related to real estate and the rights of parties therein, the action must be brought in the county where the property is located. Georgia Casualty Company vs. O'Donnell, 109 Fla. 290, 147 so. 267 (1933).

3. This "local action ruie" is jurisdictional. Board of Trustees of Internal Improvement Trust Fund vs. Mobil Oil Corporation, 455 So. 2d 412 (Fla. 2d DCA 1984), modified on other grounds, 492 So. 339, cert. denied, 479 U.S. 1065, rehearing denied, 480 U.S. 941.

4. This action is "local" in that it touches and concerns real property and the rights of parties thereto. This court lacks subject matter jurisdiction of this proceeding.

WHEREFORE, this Defendant prays that the Court will consider the foregoing and dismiss the Plaintiffs' Amended Complaint with prejudice.

/S/

PHILIP A. BATES
BATES & TIPTON, P.A.
700 South Palafox, Suite 3-A
Pensacola, Florida 32501
(904) 469-00202
Attorney for E. D. Bob Pierce
Florida Bar No.: 228354

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Motion to Dismiss for Lack of Jurisdiction of the Subject Matter has been furnished to Albert C. Penson, Post Office Box 1327, Tallahassee, Florida 32302, by United States mail, postage prepaid, this the 15 day of October, 1990.

/S/

Philip A. Bates

IN THE CIRCUIT COURT FOR THE SECOND JUDICIAL CIRCUIT IN AND FOR LEON COUNTY, FLORIDA

JACK. D. KELLY, individually and JACK D. KELLY as President/ Shareholder of Maple Leaf Development Corp.,

Plaintiff,

vs. CASE NO. 90-3398

TREE FARM DEVELOPMENT COP.; EMORY O. WILLIAMS, JR.; GEORGE G. PHILLIPS, JR.; E. D. BOB PIERCE; and the Estate of ABRAHAM L. PIERCE,

Defendants.

_____/

ORDER ON MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION OR, IN THE ALTERNATIVE, TRANSFER

THIS CAUSE having come on before the Court upon the Motion of Tree Farm Development Corporation, and others, to dismiss for lack of subject matter jurisdiction and to abate or, in the alternative, transfer for improper venue; and the Court having reviewed the Motions and having heard the argument of counsel and being otherwise fully advised in the premises, finds and decides as follows:

1. This action involves a claim by the Plaintiff which in substance relates to the Plaintiff's claim to title of certain real property situate in Escambia County, Florida. Since the action is, therefore, a "local action" it should have been filed in Escambia County, Florida.

2. Under the circumstances, the case should be transferred to Escambia County, Florida. It is, thereupon,

CONSIDERED, ORDERED AND ADJUDGED that this case shall be and the same is hereby transferred to Escambia County, florida. The Clerk of this Court shall transfer the pleadings file, or a copy thereof, as may be appropriate, to the Clerk of the Circuit Court in and for Escambia County, florida. The Plaintiff shall be responsible for any filing fees or other transfer costs which may be incurred or required by the Clerk of this Court, or the Clerk of the Circuit Court in and for Escambia County, Florida, in connection with such transfer. The Motions to Dismiss the Plaintiff's Complaint for failure to state a cause of action have not been heard or disposed of by this Court and the same remain pending. Accordingly, and under the applicable Rules of Civil Procedure, no Answer or other responsive pleading is yet due by those Defendants who have filed with motions to Dismiss for failure to state a cause of action.

DONE AND ORDERED in Chambers at Tallahassee, Leon County, florida, this 12 day of March 1991

CIRCUIT JUDGE

Copies furnished to:

Philip A. Bates
Stephen R. Moorhead
Carl R. Pennington, Jr.
Emory O. Wiliams, Jr.
Albert C. Penson

CR015.PAB

IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA

Docket No. 91-01185

JACK D. KELLY,
Appellant,
v.
TREE FARM DEVELOPMENT CORP., ET AL
Appellees,

MOTION FOR REHEARING

On Appeal from the Circuit court
Leon County, Florida
Case No. 91-3398-CA-01

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Fla. Bar No. 176414
Attorney for Appellant

IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA

JACK D. KELLY,
Appellant, DOCKET NUMBER 91-1185
v.
TREE FARM DEVELOPMENT CORP., et as
Appellee.
_____/

MOTION FOR REHEARING

COMES NOW THE APPELLANT, JACK D. KELLY, by and through his undersigned attorney, pursuant to Fla. R. App. P., Rule 9.330, and requests a rehearing and would argue as follows:

1. The affirmance of the lower court's ruling occurred on the 7th day of November, 1991, and this Motion for Rehearing is timely filed.

2. Appellant, in his appeal, raises various issues but the single dispositive issue deals with whether or not the lower court improperly applied the local action rule to Appellant's complaint that was filed in Leon County.

3. Appellant's initial brief and Response to Answer Brief correctly set forth the law that should be applied to the facts of this appeal.

4. The Court has overlooked or misapprehended the law as ruled in the cases of Lakeland Ideal Farm and Drainage District v. Mithcell, 122 So. 2d516 (1929), Publix Supermarkets v. Cheesbor Roofing Co., 502 So. 2d 484 (Fla. 5th DCA-1987) wherein it has been well established that the simple involvement of real property in an action does not render that action subject to the local action rule but the court must look at the underlying major questions involved in the litigation.

5. The Court has overlooked or misapprehended the facts of the appeal in that the underlying major question involved in Appellant's complaint involved merger and not real estate.

6. The Court has overlooked or misapprehended the law as decided in Royal v. Parado, 462 So. 2d 849 (Fla. 1st DCA, 1985)

and Singer v. Tobin, 201 So. 2d 799 (Fla. 3rd DCA, 1967 wherein it is well established that courts of equity have jurisdiction where venue lies even though the suit will affect lands (real property) not within the territorial jurisdiction of the court.

7. The court has overlooked or misapprehended the facts and law in that Appellant's complaint involved equitable jurisdiction alleging fraud and demanding rescission/cancellation of a purported merger.

8. A proper application of the law to the facts of this appeal mandate the finding that an action to set aside a merger is not subject to the local action rule and that Appellant's complaint does not involve real estate in litigation but involves a merger in litigation. There are no questions to be determined regarding real estate once the merger issue is determined and therefore the lower Court's transfer of Appellant's complaint from Leon County to Escambia County, is in err.

9. The Appellant requests hearing on this Motion for Rehearing to be set for more than thirty days hence to allow Appellant to file briefs with the Court on matters of law relating to the Motion and Appeal.

WHEREFORE, Appellant respectfully demands a rehearing on his Appeal and thirty days from the date of filing to file memoranda.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Motion for Rehearing has been furnished to Phillips A. Bates, Esquire, 125 West Romana Street, Suite 800, Post Office Box 13010, Pensacola, Florida, 32501; Stephen R. Moorehead, Esquire, 700 South Palafox Street, Suite 3C, Pensacola, Florida 32501; Carl R. Pennington, Esquire, 3375 Capitol Circle, Post Office Box 13527, N. E., Tallahassee, Florida 32317; Emory O. Williams, Esquire, 306 Third Lane, Palm Beach Gardens, Florida, 33410; Estate of George G. Phillips, Jr., Esquire, _____ _____, by U.S. Mail this 21st day of November, 1991.

/s/

BURTON E. STRUBHAR
3298 Summit Blvd., Ste. 31B
Post Office Box 30215
Pensacola, Florida 32503
(904) 432-7001
Fla. Bar No. 176414
Attorney for Appellant

IN THE SUPREME COURT OF FLORIDA

JACK D. KELLY, individually and
JACK D. KELLY, as President/Shareholder
of Maple Leaf Development Corp.,
Appellant,

v.

Case. No. 79,254
District Court of Appeal
1st District-No. 91-1185

TREE FARM DEVELOPMENT CORPORATION,
ET AL.,
Appellees

MOTION FOR SUPREME COURT TO ACCEPT JURISDICTION OR IN THE ALTERNATIVE, TO REINSTATE APPEAL

Appellant, JACK D. KELLY, hereinafter referred to as Maple Leaf, moves for the Supreme Court to exercise its jurisdiction to hear his appeal from the First District Court of Appeal's decision in case number 91-1185 and for grounds sincerely prays that the court consider the following:

1. Jurisdiction does exist for this court to hear Maple Leaf's appeal in that the affirmance of the lower court's decision denies Maple Leaf and Jack Kelly of their right to access the proper court of its choice in violation of Florida Statute 47.011.

2. Jurisdiction does exist for this court to hear Maple Leaf's appeal to the Supreme Court, in that affirmance of the lower court's decision denies Maple Leaf and Jack D. Kelly of their right to due process of law in violation of Article I, Section Nine, Constitution of the State of Florida, which mandates that "no person shall be deprived of life, liberty or property without due process of law..." (Florida Constitution, Art.1, Section 9).

3. Jack D. Kelly, Appellant, is the sole owner of all assets of the corporation known as Maple Leaf Development Corporation, Appellant, and has not relinquished that ownership, however, Tree Farm claims that a merger occurred between Maple Leaf and Tree Farm that transfers ownership of Maple

Leaf to Tree Farm. This change of ownership is alleged to have occurred because Tree Farm filed a fraudulent merger document with the Secretary of State's Office in Leon County, Florida. Maple Leaf filed its action in Leon County to set aside this fraudulent merger. If the fraudulent merger is allowed to stand it will deprive Maple Leaf and Jack D. Kelly of their assets of the corporation.

4. After Maple Leaf's complaint was filed in Leon County, Tree Farm made its motion to dismiss and the lower court ruled that the complaint must be transferred to Escambia County, Florida because some of the assets of the corporation involved real property located in Escambia County, Florida and therefore the Local Action Rule applies to Maple Leaf's complaint and requires the complaint to be heard in Escambia County, Florida. This ruling is the subject matter of Maple Leaf's appeal, which is now pending before this court.

5. The subject matter of Maple Leaf's complaint has always been whether or not a merger took place between Maple Leaf and Tree Farm. If a merger did not take place all parties to this action would agree that tree farm would not own any assets of the Maple Leaf corporation. The merger issue must be determined before any rights to real property or other assets can possibly be determined.

6. The application of the "Local Action Rule" has no reasonable relationship to Maple Leaf's action to set aside a merger and therefore should not be applied to a complaint to set aside a merger just because the corporations might own real property.

7. Maple Leaf has a statutory right to bring its action to set aside a merger where the fraudulent merger document was filed. Actions shall be brought only in the county where the defendant resides, where the cause of action accrued or where the property in litigation is located. (Section 47.011, Florida Statute.) maple Leaf brought its action where its cause of action accrued and it must not be denied access to the proper court.

8. Tree Farm has attempted to cast Maple Leaf's complaint as an action regarding real property, when in fact the complaint is an action to determine the validity of a merger. This denies

Maple Leaf access to the forum Maple Leaf properly chose. To deny this choice is a violation of Florida's venue statute, Section 47.011, Florida Statutes. Just because Maple Leaf owned real property does not require an action determining the validity of a merger to be heard only in the circuit court where the property is located.

9. The District Court of Appeal's opinion in affirming the lower court's decision in effect, declares invalid Florida's venue statute and in so ruling denies Maple Leaf of its constitutional right of due process of law as guaranteed by Article 1, Section Nine, Florida Constitution, providing, that no person shall be deprived of property without due process of law.

10. It is permissible to determine the question of the court's jurisdiction at any time in the proceedings. (13 Fla. Jur. 2d, Section 28). Maple Leaf's complaint has been cast by Tree Farm erroneously and in so doing, the complaint and now appeal to this court is being denied because of jurisdictional reasons. This court can correct the jurisdictional question by accepting jurisdiction and allowing briefs to be submitted for resolution of the issues brought before the First District Court of Appeal.

A court cannot improperly refuse to exercise jurisdiction once it is shown to exist (13 Fla. Jur.2nd, Section 30). Jurisdiction did exist for the Leon County Circuit Court to hear Maple Leaf's complaint. This denial of Maple Leaf's due process of law by the lower courts ruling and the affirmance of that ruling by the first district, mandates that this court set the jurisdictional issue to rest by accepting the case for review and ordering the parties' briefs to be filed.

WHEREFORE, Maple Leaf and Jack D. Kelly sincerely pray that this court will accept jurisdiction and require briefs to be submitted for further review.

_____/S/_____
BURTON E. STRUBHAR
3298 Summit Blvd., Ste. 31B
Pensacola, Florida 32502
(904) 432-7001
Fla. Bar. No. 176414

Attorney for Appellant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the above and foregoing has been furnished to Philip A. Bates, Esquire, 125 W. Romano Street, Pensacola, Florida 32501; Stephen R. Moorehead, Esquire, 700 South Palafox Street, Ste. 3C, Pensacola, Fla. 32501; Carl R. Pennington, Esquire, 3376 Capitol Circle, P. O. Box 13527, N. E., Tallahassee, Fla. 32317; Emory O. Williams, Esquire 306 Third Lane, Palm Beach Gardens, Florida 33410; by U. S. Mail this 10th day of February, 1992.

/S/
BURTON E. STRUBHAR

FLORIDA DEPARTMENT OF STATE
JIM SMITH
SECRETARY OF STATE

October 16, 1990

Mr. Jack Kelly
Jamestown Apartments
3331 Summit Boulevard
Apartment 87
Pensacola, Florida 32503

Dear Mr. Kelly:

This letter is at your request regarding MAPLE LEAF DEVELOPMENT CORPORATION which was incorporated on April 6, 1970 and subsequently merged into TREE FARM DEVELOPMENT CORPORATION, a Delaware corporation on February 1, 1972.

According to information you supplied this office the terms of the merger agreement were never met and you are seeking a court order to, in effect, "lay aside" the merger.

Last year you attempted to reinstate the MAPLE LEAF DEVELOPMENT CORPORATION and this office advised you that there was no statutory authority to reinstate a corporation which had merged with another corporation. As provided in 607.1106 (1) (a) the corporation merging into the surviving corporation ceases to exist at the time of the merger. The only corporation which can be reinstated is a corporation that has been administrateively (involuntarily) dissolved, and action taken by this office for failure to file the corporation annual report.

After this office explained to you that there was no authority under which you could reinstate the original corporation, you decided to form a new corporation under the same name on October 3, 1989.

If your intent is to reinstate the original MAPLE LEAF DEVELOPMENT CORPORATION, a court order advising this office to "unfile" the merger for failure to meet the terms of the merger agreement must be obtained. When the court order is filed with this office the merger of the two corporations will be "unfiled" and at that time the original MAPLE LEAF DEVELOPMENT CORPORATION will be an inactive corporation which can then be reinstated.

I trust this information is sufficient for your needs. Further filing questions and fee information can be obtained from this office when you need them.

Sincerely,

/s/
(Mrs.) Karon Beyer, Bureau Chief
Bureau of Commercial Recording

KB/ml
cc: Mr. Al Penson
P.O. Box 1327
Tallahassee, Florida 32302

LAW OFFICES
GLENN R. GRONLUND
FIRST FIDELITY BANK BUILDING
1301 ATLANTIC AVENUE
ATLANTIC CITY, NEW JERSEY 08401

October 29, 1990

Philip A. Bates, Esquire
Bates & Tipton, P.A.
700 South Palafox, Suite 3A
Pensacola, FL 32501

Re: Kelly v. Tree Farm Development Corporation, et al.

Dear Mr. Bates:

We have carefully reviewed the Amended Complaint which has been filed in this action. As I am sure you recognize, this Declaratory Judgement seeks to undo the terms of a certain merger agreement enteredinto by the various parties. The plaintiff is suing his partners for failing to live up to the terms and conditions of that agreement and to return the parties to where they were prior to that agreement.

As such, there is being no claim made against the title to Tree Farm properties, as such. The only claims are breach of contract actions which are not covered by the title insurance policy.

Accordingly, we must respectfully advise you that there is no title insurance for the claims being alleged by Jack Kelly against Tree Farm Development Corporation. As such, we must decline to give you any instructions as to how you may conduct the breach of contract litigation. The construction of the interest of the various parties is dependent upon the Court determining who breached the contract, not whether there was good and sufficient title at issue in the first place. If you have any other additional information with which you would like to acquaint us, perhaps

we coud review this matter. But as presently presented. There is no cause of action stated for which there is title insurance under the policy issued.

Very truly yours,

CHELSEA TITLE AND GUARANTY COMPANY

By: /s/
Glenn R. Gronlund, Esq.
General Counsel

Supreme Court, U.S.
FILED
AUG 24 1992
OFFICE OF THE CLERK

No. 92-327

In The

Supreme Court of the United States

October Term, 1992

JACK DAVID KELLY, Individually and
JACK DAVID KELLY, as President/Shareholder of
MAPLE LEAF DEVELOPMENT CORPORATION,

Petitioner,

v.

TREE FARM DEVELOPMENT CORPORATION;
EMORY O. WILLIAMS, JR.;
GEORGE G. PHILLIPS, JR.; E. D. "BOB" PIERCE;
and THE ESTATE OF ABRAHAM L. PIERCE,

Respondents.

**Petition For Writ Of Certiorari To The
District Court Of Appeal, First District
For The State Of Florida**

BRIEF OF RESPONDENTS TREE FARM DEVELOPMENT CORPORATION AND E. D. "BOB" PIERCE IN OPPOSITION TO CERTIORARI

DENNIS K. LARRY,
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CLARK, PARTINGTON, HART, LARRY,
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Counsel for Tree Farm Development Corporation
and E. D. "Bob" Pierce, Respondents

August 24, 1992

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED FOR REVIEW

In accordance with Rule 15.1, Rules of the Supreme Court of the United States, Respondents Tree Farm Development Corporation ("Tree Farm") and E. D. "Bob" Pierce ("Pierce"), respectfully submit that the questions presented for review by the Petitioner do not accurately depict the issues which would be before this Court should this Court grant the Petition for Writ of Certiorari, because the questions do not accurately reflect the lower courts' holdings.

With regard to Question "A" asserted by the Petitioner, the decision of the Circuit Court in and for Leon County, Florida, specifically held that the substance of the Plaintiff's claim dealt with title to certain real property which was located in Escambia County, Florida. The court then held that since the action was a "local action" it should have been filed in Escambia County, Florida, and, accordingly, transferred the case to the Circuit Court in and for Escambia County, Florida. Consequently, the question would be more appropriately phrased as set forth below.

With regard to Question "B" asserted by the Petitioner, these Respondents respectfully submit that the issue would be phrased more appropriately as set forth below.

QUESTIONS PRESENTED FOR REVIEW – Continued

With regard to Question "C" asserted by the Petitioner, as with Question "A," it is respectfully asserted that the use of the term transfer to another "jurisdiction" is misleading since the transfer was to another county within the same state, and the question would be more appropriately phrased as set forth below.

With regard to Question "D" asserted by the Petitioner, the Respondents find this question to be basically acceptable.

Consequently, Respondents Tree Farm and Pierce respectfully submit the following questions which more accurately reflect the issues which would be reviewed by this Court, should certiorari be granted.

A. Whether the Circuit Court of Leon County, Florida, properly applied the law of the State of Florida in transferring a case to another county within the same state based upon that court's finding that the substance of the Complaint filed by Petitioner related to the title to real property situate in the county to which the case was transferred.

B. Whether the Supreme Court of the State of Florida, as a matter of Florida Constitutional law, had jurisdiction to review a *per curiam* affirmance by the First District Court of Appeal of the interlocutory ruling of the Circuit Court in and for Leon County, Florida.

C. Whether the Circuit Court in and for Leon County, Florida, correctly held that the substance of the Petitioner's Complaint related to title of real property in

QUESTIONS PRESENTED FOR REVIEW – Continued

Escambia County, Florida, and, therefore, as a matter of Florida law, correctly transferred the Petitioner's case to Escambia County, Florida, the county where the property was located.

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RESPONDENTS' BRIEF IN OPPOSITION TO CERTIORARI

OPINIONS BELOW

Respondents Tree Farm and Pierce concur with the statement of opinions below contained in the Petition for Writ of Certiorari; however, these Respondents would additionally assert that the opinions contained in the Respondents' Appendix ("RA"), at RA 2, RA 3, RA 4, and RA 5, are also relevant to this Court's determination as to whether to grant the Petition for Writ of Certiorari. The first opinion contained in the appendix is the July 16, 1991, opinion of the District Court of Appeal, First District, State of Florida, granting these Respondents' motion for treatment of the Petitioner's appeal as an interlocutory appeal for briefing purposes. The second, at RA 3, is the September 12, 1991, decision of the District Court of Appeal, First District, State of Florida, denying the Petitioner's Motion to Supplement the Record on Appeal. The third, at RA 4, is the December 19, 1991, opinion of the District Court of Appeal, First District, denying the Petitioner's Motion for Rehearing. Finally, the opinion of the Supreme Court of Florida, rendered March 10, 1992, denying the Petitioner's motion to reinstate appeal, is found at RA 5.

JURISDICTION

Petitioner's motion for rehearing in the First District Court of Appeal was denied on November 21, 1991. The Petitioner apparently seeks to invoke the jurisdiction of this Court pursuant to 28 U.S.C. § 1257(a), and Rule

10.1(c) of the Rules of the Supreme Court of the United States.

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES INVOLVED

Article V, Section 3(b) of the Constitution of the State of Florida, (1968), as amended, sets forth the jurisdiction of the Supreme Court of the State of Florida. Its provisions are set forth below:

> (b) JURISDICTION. – The supreme court:
>
> (1) Shall hear appeals from final judgments of trial courts imposing the death penalty and from decisions of district courts of appeal declaring invalid a state statute or a provision of the state constitution.
>
> (2) When provided by general law, shall hear appeals from final judgments entered in proceedings for the validation of bonds or certificates of indebtedness and shall review action of statewide agencies relating to rates or service of utilities providing electric, gas, or telephone service.
>
> (3) May review any decision of a district court of appeal that expressly declares valid a state statute, or that expressly construes a provision of the state or federal constitution, or that expressly affects a class of constitutional or state officers, or that expressly and directly conflicts with a decision of another district court of appeal or of the supreme court on the same question of law.

(4) May review any decision of a district court of appeal that passes upon a question certified by it to be of great public importance, or that is certified by it to be in direct conflict with a decision of another district court of appeal.

(5) May review any order or judgment of a trial court certified by the district court of appeal in which an appeal is pending to be of great public importance, or to have a great effect on the proper administration of justice throughout the state, and certified to require immediate resolution by the supreme court.

(6) May review a question of law certified by the Supreme Court of the United States or a United States Court of Appeals which is determinative of the cause and for which there is no controlling precedent of the supreme court of Florida.

(7) May issue writs of prohibition to courts and all writs necessary to the complete exercise of its jurisdiction.

(8) May issue writs of mandamus and quo warranto to state officers and state agencies.

(9) May, or any justice may, issue writs of habeas corpus returnable before the supreme court or any justice, a district court of appeal or any judge thereof, or any circuit judge.

(10) Shall, when requested by the attorney general pursuant to the provisions of Section 10 of Article IV, render an advisory opinion of the justices, addressing issues as provided by general law.

Article V, Section 4(b) of the Constitution of the State of Florida (1968), as amended, sets forth the jurisdiction of the District Courts of Appeal of the State of Florida. This subsection is set forth in full below:

> (b) JURISDICTION. –
>
> (1) District courts of appeal shall have jurisdiction to hear appeals, that may be taken as a matter of right, from final judgments or orders of trial courts, including those entered on review of administrative action, not directly appealable to the supreme court or a circuit court. They may review interlocutory orders in such cases to the extent provided by rules adopted by the supreme court.
>
> (2) District courts of appeal shall have the power of direct review of administrative action, as prescribed by general law.
>
> (3) A district court of appeal or any judge thereof may issue writs of habeas corpus returnable before the court or any judge thereof or before any circuit judge within the territorial jurisdiction of the court. A district court of appeal may issue writs of mandamus, certiorari, prohibition, quo warranto, and other writs necessary to the complete exercise of its jurisdiction. To the extent necessary to dispose of all issues in a cause properly before it, a district court of appeal may exercise any of the appellate jurisdiction of the circuit courts.

Article I, Section 9 of the Constitution of the State of Florida (1968), as amended, sets forth the "due process" rights of citizens of the State of Florida. It is set forth in full below:

> **SECTION 9. Due Process.** – No person shall be deprived of life, liberty or property without due process of law, or be twice put in jeopardy for the same offense, or be compelled in any criminal matter to be a witness against himself.

Rule 9.130(a)(3), Florida Rules of Appellate Procedure, governs the appeal of "non-final" or interlocutory orders. The provisions of Rule 9.130(a)(3) are set forth below:

> (3) Review of non-final orders of lower tribunals is limited to those which:
>
> (A) concern venue;
>
> (B) grant, continue, modify, deny or dissolve injunctions, or refuse to modify or dissolve injunctions;
>
> (C) determine:
>
> (i) jurisdiction of the person;
>
> (ii) right to immediate possession of property;
>
> (iii) right to immediate monetary relief or child custody in domestic relations matters;
>
> (iv) the issue of liability in favor of a party seeking affirmative relief; or
>
> (v) whether a party is entitled to arbitration.

STATEMENT OF THE CASE

The procedural background of this case as set forth by the Petitioner, is basically adequate; however, Respondents feel it essential to note that Petitioner's statement at page 2 of their Petition that "the lower court's actions have deprived them of their rights to due process of law," must be qualified by the notation that in their "Motion for Supreme Court to Accept Jurisdiction or In the Alternative to Reinstate Appeal," found at A-7 of the Petition, the only "due process" rights asserted by the Petitioner arose under the "Florida Constitution, Art. 1, Section 9." No mention was made of the Fourteenth Amendment to the United States Constitution.

ARGUMENT

I.

THE DECISION WHICH THE PETITIONER ASKS THIS COURT TO REVIEW IS NOT A "FINAL JUDGMENT OR DECREE," WITHIN THE MEANING OF 28 U.S.C. § 1257(a) AND, THEREFORE, THIS COURT DOES NOT HAVE JURISDICTION TO GRANT THE INSTANT PETITION.

The Order of the Circuit Court of Leon County, Florida, held simply that the Complaint filed by the Petitioner, in substance, alleged a dispute as to the title of certain real property located in Escambia County, Florida. Accordingly, the court ordered that the case be transferred to Escambia County, Florida, where the property in issue was located. *See* A-3, A-4, and A-5 to Petition for Writ of Certiorari. The Petitioner appealed this order to

the First District Court of Appeal, apparently pursuant to Florida Rule of Appellate Procedure 9.130(a)(3)(A). *See* Motion for Treatment as Interlocutory Appeal for Briefing Purposes, found at RA 6, and Order of the First District Court of Appeal granting Pierce's Motion for Treatment As Interlocutory Appeal for Briefing Purposes, found at RA 2.

This Court has held that to be reviewable, the state court judgment "must . . . be final as an effective determination of the litigation and not of only merely interlocutory or intermediate steps therein. It must be the final word of a final court." *Market Street R. Co. v. Railroad Commission,* 324 U.S. 548, 551 (1945). This Court has also held that a state court order determining the proper venue for a case to proceed is not a final judgment, unless an important federal policy would be defeated by an incorrect assignment of venue. *Cincinnati Street R. Co. v. Snell,* 179 U.S. 395 (1900).[1]

Consequently, this Court does not have jurisdiction to grant the instant Petition for Writ of Certiorari, because the order sought to be reviewed was not a "final judgment or decree" within the terms of the applicable statute which determines the jurisdiction of this Court, 28 U.S.C. § 1257.

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[1] *Mercantile National Bank v. Langdeau,* 371 U.S. 555 (1963), is distinguishable because the determination of venue in that case was based upon an interpretation of a federal statute. In this case, the determination of venue is based entirely upon Florida state law.

II.

THE PETITION FOR WRIT OF CERTIORARI WAS NOT TIMELY FILED AND, THEREFORE, THIS COURT DOES NOT HAVE JURISDICTION PURSUANT TO RULE 13 OF THE RULES OF THE UNITED STATES SUPREME COURT.

Rule 13 of the Rules of the United States Supreme Court requires that petitions for writs of certiorari to review a judgment entered by a state court of last resort must be filed with the Clerk of this Court within 90 days of the entry of judgment. The question, of course, then becomes one of determining precisely what the "judgment" is as to which review is sought. Respondents Tree Farm and Pierce respectfully suggest that the order of which Petitioner seeks review is the District Court of Appeal's *per curiam* affirmance of the Circuit Court's interlocutory order. The District Court of Appeal denied rehearing on December 19, 1991 (RA 4). Petitioner did not seek an extension of time to file his Petition for Writ of Certiorari until some time in June, 1992, approximately six months after rehearing was denied by the First District Court of Appeal.[2]

The Florida Constitution, Article V, § 3(b), was amended in 1980 limiting the appellate jurisdiction of the Florida Supreme Court. That Florida Constitutional Amendment made the District Courts of Appeal, for most

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[2] Although the grounds for Petitioner's application for extension of time were that he was unable to retain counsel to file the instant petition, the instant petition was, in fact, filed by the same attorney who has represented the Petitioner since at least February of 1991.

cases, the "court of last resort." *Cf.* FLA. CONST. Art. V § 4(b) (1968), as amended. This limited jurisdiction of the Florida Supreme Court has been previously recognized by this Court. *See Palmore v. Sidoti,* 466 U.S. 429, 431 (1984); *Williams v. Florida,* 399 U.S. 78, 80 n. 5 (1970). The Florida Supreme Court has held that it does not have jurisdiction to review a "Per Curiam Affirmed" opinion of a district court of appeal. *Dodi Publishing Co. v. Editorial America, S.A.,* 385 So.2d 1369 (Fla. 1980); *Jenkins v. State,* 385 So.2d 1356 (Fla. 1980). This lack of jurisdiction was also recognized in this very case by the Supreme Court of Florida as illustrated by its Order of January 27, 1992, found at A-2 of Petition, and the March 10, 1992, denial of the Petitioner's "Motion to Reinstate Appeal," found at RA 5.

Consequently, in this case, the District Court of Appeal was the "court of last resort," and the Petitioner did not initially seek an extension of time until early June of 1992, nearly six months after the denial of the motion for rehearing by the District Court of Appeal on December 19, 1991. Consequently, the Petition for Writ of Certiorari is untimely, and should therefore be denied.

III.

THE PETITIONER HAS FAILED TO PRESENT ANY SUBSTANTIAL FEDERAL QUESTION WHICH WAS RAISED BEFORE AND DECIDED BY THE STATE COURTS, AND, THEREFORE, CERTIORARI WOULD BE INAPPROPRIATE PURSUANT TO SUPREME COURT RULE 10.1(c).

Supreme Court Rule 14.1(h) requires that:

> If review of a judgment of a state court is sought, the statement of the case shall also specify

> the stage in the proceedings, both in the court of first instance and in the appellate courts, at which the federal questions sought to be reviewed were raised; the method or manner of raising them, and the way in which they were passed upon by those courts . . . as will show that the federal question was timely and properly raised so as to give this court jurisdiction to review the judgment on a writ of certiorari.

The Petitioner in this case has made no effort whatsoever to comply with this Rule, the sole federal issue articulated in the Petitioner's "Statement of the Facts" being an oblique reference to "depriving Petitioner of his rights without due process of law" in the final sentence thereof.

Prior to the Petition filed with this Court, the only reference to any federal constitutional issue was contained in a "Motion for Rehearing on Order Denying Appellant's Motion to Supplement Record on Appeal" filed in the District Court of Appeal on September 27, 1991. This motion may be found at RA 11. Further, that assertion therein of Fourteenth Amendment rights was solely in the context of the Court allowing a prior attorney who had represented the Petitioner to withdraw from the representation. Further, it must be noted that in the Petitioner's "Motion for Supreme Court to Accept Jurisdiction or In the Alternative, to Reinstate Appeal," the Petitioner made no reference to federal constitutional rights, and in fact, referred specifically, and solely, to the "due process" provision found in Article I, Section 9 of the Florida Constitution. *See* A-7 at paragraph 2.

This Court has long held that it is without jurisdiction to review state court judgments unless the federal

question is not only substantial, but also properly raised in the prior state court proceedings. *See Crowell v. Randell*, 10 Pet. 368, 391-98 (1836). *See also, Illinois v. Gates*, 462 U.S. 213, 218-20 (1983); *Cardinale v. Louisiana*, 394 U.S. 437, 439 (1969). The federal question must have been raised, presented, and pursued in a timely and proper manner at the appropriate point or points in the state court proceedings. *Beck v. Washington*, 369 U.S. 541, 550-54 (1962); *Godchaux Co. v. Estopinal*, 251 U.S. 179, 181 (1919). If "the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show the contrary." *Street v. New York*, 394 U.S. 576, 582 (1969). If the highest state court is silent on the asserted federal question, the Court will assume, unless it can be affirmatively shown otherwise, that the state court's silence is due to the procedural deficiency of the assertion of the federal question. *Bailey v. Anderson*, 326 U.S. 203, 206-07 (1945); *Mutual Life Ins. Co. v. McGrew*, 188 U.S. 291, 309 (1903).

Further, this Court has held that a petitioner may very well have waived a federal issue that has not been asserted and argued before the highest state court, *Beck v. Washington*, 369 U.S. at 553.

This Court has also in the past held that merely referring to "due process of law" is insufficient to properly frame a federal question for the Court to exercise jurisdiction. *Bowe v. Scott*, 233 U.S. 658, 664-65 (1914). *See also Brady v. Maryland*, 373 U.S. 83, 91 (1963) (opinion of White, J.); *Minnesota v. National Tea Co.*, 309 U.S. 551, 559 (1940) (Hughes, C. J., dissenting).

Finally, if the Petitioner, as happened in this case, does not raise the federal question until the Petition for Writ of Certiorari, the assertion of the federal question comes too late. *See White River Lumber Co. v. Arkansas, Ex. Rel. Applegate*, 279 U.S. 692, 700 (1929); *Whitney v. California*, 274 U.S. 357, 362-63 (1927); *Hiawassee River Power Co. v. Carolina-Tennessee Power Co.*, 252 U.S. 341, 344 (1920); *Thomas v. Iowa*, 209 U.S. 258 (1908).

Even had the Petitioner properly presented and argued a federal question in state courts, the issues implicated in the instant case simply do not constitute a "substantial federal question." The issues involved are exclusively those of state law. In essence, the basis of all appeals by Petitioner to date have been grounded in the circuit court's construction of the Florida "Local Action Rule." *See Georgia Casualty Company v. O'Donnell*, 109 Fla. 290; 147 So. 267 (1933). All that has occurred is a ruling that the case should not have been filed in Leon County, Florida, and should be transferred to the Circuit Court in and for Escambia County, Florida. Petitioner is not being denied a right to seek his remedy; rather, he is simply being required to seek his remedy in Escambia County, Florida, where, it must be noted, both he and his present counsel reside. He has never articulated any prejudice which he might suffer by litigating the case in Escambia County, as opposed to Leon County, Florida. He has never articulated any reason for his opposition to the transfer other than his claimed "absolute right" to bring an action in a court of his choosing which is, of course, contrary not only to Florida's Local Action Rule, but also to the federal venue statutes. In other words, the Petitioner has not presented any federal question at all in this

case, and certainly not one which could reasonably be called "substantial."

In summary, the Petitioner failed to raise any federal question at any level of the state court proceedings, such issue not having been raised until the Petition for Writ of Certiorari was filed with this Court. Consequently, the Petitioner has asserted no substantial federal question justifying the invocation by this Court of its certiorari powers.

CONCLUSION

This Court should not grant the Petition for Writ of Certiorari in this case for three reasons. First, the decision sought to be reviewed is not a "final judgment or decree" within the terms of the jurisdictional statutes of this Court. Second, the Petition in the instant case was not timely filed. Finally, the Petitioner failed to raise any federal question whatsoever, and even if he had raised a substantial federal question, such question was not raised in a timely manner in the prior state court proceedings. As a result of all of the foregoing, separately and cumulatively, Respondents Tree Farm and Pierce respectfully submit that this Court should decline to exercise its

discretionary power to review the State Court's decision by Writ of Certiorari.

Respectfully submitted,

DENNIS K. LARRY,
Counsel of Record
PHILIP A. BATES
BRUCE D. PARTINGTON
CLARK, PARTINGTON, HART, LARRY,
BOND, STACKHOUSE & STONE
125 West Romana Street, Suite 800
Post Office Box 13010
Pensacola, FL 32591-3010
(904) 434-9200

No. _____

In The

Supreme Court of the United States

October Term, 1992

JACK DAVID KELLY, Individually and JACK DAVID KELLY, as President/Shareholder of MAPLE LEAF DEVELOPMENT CORPORATION,

Petitioner,

v.

TREE FARM DEVELOPMENT CORPORATION; EMORY O. WILLIAMS, JR.; GEORGE G. PHILLIPS, JR.; E. D. "BOB" PIERCE; and THE ESTATE OF ABRAHAM L. PIERCE,

Respondents.

Petition For Writ Of Certiorari To The District Court Of Appeal, First District For The State Of Florida

APPENDIX TO BRIEF OF RESPONDENTS TREE FARM DEVELOPMENT CORPORATION AND E. D. "BOB" PIERCE IN OPPOSITION TO CERTIORARI

DISTRICT COURT OF APPEAL, FIRST DISTRICT
Tallahassee, Fl. 32399
Telephone (904) 488-6151

DATE July 16, 1991

LT 90-3398

CASE NO. 91-1185

JACK D. KELLY, et al.
appellant/petitioner

vs.

TREE FARM DEVELOPMENT CORP., et al.
appellee/respondent

ORDER

Appellee's motion for treatment as interlocutory appeal for briefing purposes, filed June 28, 1991, is granted.

By order of the court

JON S. WHEELER, CLERK

I HEREBY CERTIFY that a true and correct copy of the above was mailed this date to the following:

Jack D. Kelly
Philip A. Bates
Carl R. Pennington, Jr.
Emory O. Williams, Jr.
Albert C. Penson
Paul F. Hartsfield
Burton Strubhar
Stephen Reid Moorhead

/s/ Laurie Black
Deputy Clerk

[SEAL]

RA 3

DISTRICT COURT OF APPEAL, FIRST DISTRICT

Tallahassee, Fl. 32399

Telephone (904) 488-6151

DATE September 12, 1991

CASE NO. 91-1185

JACK D. KELLY, et al. appellant/petitioner	vs.	TREE FARM DEVELOPMENT CORP., et al. appellee/respondent

ORDER

Appellee's motion filed August 14, 1991, seeking to supplement the record on appeal, is denied.

By order of the court

JON S. WHEELER, CLERK

I HEREBY CERTIFY that a true and correct copy of the above was mailed this date to the following:

Jack D. Kelly
Philip A. Bates
Carl R. Pennington, Jr.
Emory O. Williams, Jr.
Albert C. Penson

Burton Strubhar
Stephen Reid Moorhead

/s/ Laurie Black
Deputy Clerk

[SEAL]

DISTRICT COURT OF APPEAL, FIRST DISTRICT

Tallahassee, Florida 32399
Telephone No. (904) 488-6151

December 19, 1991

CASE NO: 91-01185

L.T. CASE NO. 90-3398

Jack D. Kelly, et al.	v.	Tree Farm Development Corp., et al.
Appellant(s),		Appellee(s).

ORDER

Motion for rehearing,
filed November 22, 1991, is DENIED.

By order of the Court

JON S. WHEELER
CLERK

I HEREBY CERTIFY that a true and correct copy of the above was mailed this date to the following:

Jack D. Kelly	Burton Strubhar
Philip A. Bates	Stephen Reid Moorhead
Carl R. Pennington, Jr.	Emory O. Williams, Jr.
Albert C. Penson	Cathi O'Halloran Wilkinson

[SEAL]

/s/ Laurie Black
Deputy Clerk

SUPREME COURT OF FLORIDA

TUESDAY, MARCH 10, 1992

JACK D. KELLY, etc., Appellant, v. TREE FARM DEVELOPMENT CORPORATION, et al., Appellees.	CASE NO. 79,254 District Court of Appeal, 1st District – No. 91-1185

Appellant's Motion to Reinstate Appeal filed in the above cause is hereby denied.

OVERTON, McDONALD, BARKETT, KOGAN and HARDING, JJ., concur

A True Copy

TEST:

Sid J. White
Clerk, Supreme Court

[SEAL]

TC

cc: Hon. Jon S. Wheeler, Clerk
Hon. Paul Hartsfield, Clerk
Hon. J. Lewis Hall, Jr., Judge
Burton E. Strubhar, Esquire
Philip A. Bates, Esquire
Stephen R. Moorehead [sic], Esquire
Carl R. Pennington, Esquire
Emory O. Williams, Esquire
Albert C. Penson, Esquire

IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA

JACK D. KELLY, individually and JACK D. KELLY as President/ Shareholder of Maple Leaf Development Corp.,

Plaintiff/Appellant,

DOCKET NO: 91-1185

vs.

TREE FARM DEVELOPMENT CORP.; EMORY O. WILLIAMS, JR.; GEORGE G. PHILIPS, JR.; E. D. BOB PIERCE and the ESTATE OF OF ABRAHAM L. PIERCE,

Defendants/Appellees.

_____/

MOTION FOR TREATMENT AS INTERLOCUTORY APPEAL FOR BRIEFING PURPOSES

COMES NOW the defendant/appellee, E. D. Bob Pierce, by and through his undersigned attorneys, pursuant to Fla.R.Civ.P. 1.060, and Fla.R.Civ.P. 9.130, and in support hereof further says:

1. The order of the Circuit Court of the Second Judicial Circuit in and for Leon County, from which his appeal arises, was a non-final order. The Circuit Court merely transferred the action to Escambia County, stating

that "[t]he Motions to Dismiss the Plaintiff's Complaint for failure to state a cause of action have not been heard or disposed of by this court and the same remain pending." (A-2). As there has been no final judgment, this appeal is an interlocutory one. *Duncan v. Pullam,* 198 So.2d 658 (Fla. 2d DCA 1967).

2. The transfer ordered by the Circuit Court was appropriate, as courts may transfer actions when it appears that the action is pending in the wrong county. Fla.R.Civ.P. 1.060.

3. Non-final orders which may be reviewed on interlocutory appeal include orders which concern venue. Fla.R.App.P. 9.130. Though this case more accurately involves subject matter jurisdiction than venue, it should receive the same treatment as a non-final order for purposes of appeal, since the action was transferred into another county. If not treated as a venue action, the appeal must be dismissed, as the Florida Rule of Appellate Procedure allowing for review of non-final orders limits such review to certain types of orders. Fla.R.Civ.P. 9.130. There is no provision allowing appeal of an order concerning subject matter jurisdiction.

4. A non-final order on review must be treated as an interlocutory appeal, in which no record is transmitted to the court, and appellant's initial brief must be served within fifteen days of filing the notice. Fla.R.Civ.P. 9.130(d), (e).

WHEREFORE, this defendant/appellee prays that the court will consider the foregoing and treat this appeal as an interlocutory one for briefing purposes. Defendant/appellee also asks that the current effort on the part of the

Clerk of the Leon County Circuit Court to transmit a "record" be abated, in accordance with Rule 9.130(d), which states that "[a] record shall not be transmitted to the court unless ordered."

/s/ Philip A. Bates
PHILIP A. BATES
Clark Partington Hart Larry
Bond Stackhouse & Stone
125 West Romana, Suite 800
POB 13010
Pensacola, FL 32591-3010
Florida Bar No: 228354
904/434-9200
Counsel for Defendant/Appellee
E. D. Bob Pierce and Tree Farm
Development Corp.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to Burton E. Strubar [sic], Esquire, 3298 Summit Boulevard, Suite 31B, Pensacola, FL 32503; Stephen R. Moorhead, Esquire, 700 South Palafox Street, Suite 3C, Pensacola, FL 32502; Carl R. Pennington, Jr., Esquire, POB 13527, Tallahassee, FL 32317; Emory O. Williams, Jr., Esquire, Admiralty Building, Suite 306, 4440 PGA Boulevard, Palm Beach Gardens, FL 33410; and Albert C. Penson, Esquire, POB 589, Tallahassee, FL 32302, by U. S. Mail delivery, this 25 day of June, 1991.

/s/ Philip A. Bates
PHILIP A. BATES

IN THE CIRCUIT COURT FOR THE SECOND JUDICIAL CIRCUIT IN AND FOR LEON COUNTY, FLORIDA

JACK D. KELLY, individually and JACK D. KELLY as President/ Shareholder of Maple Leaf Development Corp.,

Plaintiff,

vs.

TREE FARM DEVELOPMENT CORP.; EMORY O. WILLIAMS, JR.; GEORGE G. PHILLIPS, JR.; E. D. BOB PIERCE; and the Estate of ABRAHAM L. PIERCE,

Defendants.

CASE NO. 90-3398

_____/

ORDER ON MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION OR, IN THE ALTERNATIVE, TRANSFER

THIS CAUSE having come on before the Court upon the Motion of Tree Farm Development Corporation, and others, to dismiss for lack of subject matter jurisdiction and to abate or, in the alternative, transfer for improper venue; and the Court having reviewed the Motions and having heard the argument of counsel and being otherwise fully advised in the premises, finds and decides as follows:

1. This action involves a claim by the Plaintiff which in substance relates to the Plaintiff's claim to title of certain real property situate in Escambia County, Florida. Since the action is, therefore, a "local action" it should have been filed in Escambia County, Florida.

2. Under the circumstances, the case should be transferred to Escambia County, Florida. It is, thereupon,

CONSIDERED, ORDERED AND ADJUDGED that this case shall be and the same is hereby transferred to Escambia County, Florida. The Clerk of this Court shall transfer the pleadings file, or a copy thereof, as may be appropriate, to the Clerk of the Circuit Court in and for Escambia County, Florida. The Plaintiff shall be responsible for any filing fees or other transfer costs which may be incurred or required by the Clerk of this court, or the Clerk of the Circuit Court in and for Escambia County, Florida, in connection with such transfer. The Motions to Dismiss the Plaintiff's Complaint for failure to state a cause of action have not been heard or disposed of by this Court and the same remain pending. Accordingly, and under the applicable Rules of Civil Procedure, no Answer or other responsive pleading is yet due by those Defendants who have filed said Motions to Dismiss for failure to state a cause of action.

DONE AND ORDERED in Chambers at Tallahassee, Leon County, Florida, this 12 day of March 1991.

/s/ J. Lewis Hall, Jr.
CIRCUIT JUDGE

Copies furnished to:
Philip A. Bates
Stephen R. Moorhead
Carl R. Pennington, Jr.
Emory O. Williams, Jr.
Albert C. Penson

IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA

JACK D. KELLY, Individually and
JACK D. KELLY, as President,
Shareholder of Maple Leaf
Development Corp.,

Appellant,

Docket No.
91-01185

v.

TREE FARM DEVELOPMENT
CORP., Emory O. Williams, Jr.,
George G. Phillips, Jr., Bob Pierce;
and the Estate of Abraham L.
Pierce,

Appellees.

MOTION TO SUPPLEMENT THE RECORD ON APPEAL

Appellant, Maple Leaf, moves for an Order allowing the record or appendix to be supplemented by including subsequent proceedings of the lower court which regards Appellant's previous attorney's motion and order allowing him to withdraw and for grounds show:

1. Maple Leaf's attorney, Albert C. Penson, Esquire filed his motion to withdraw and a hearing was held on August 1, 1991, wherein the court allowed him to state his allegations and to withdraw. (Exhibit 1)

2. Maple Leaf objected to withdrawal seeking return of their attorney fees and a hearing on their attorney's adequate representation.

3. Maple Leaf was not allowed to present any evidence at the scheduled Motion to Withdraw hearing held

on August 1, 1991 (See attached Exhibit 2, Transcript of hearing).

4. a. The attorney Penson was recommended to Jack David Kelly and Maple Leaf Development Corporation by the Florida Bar in Tallahassee after Mr. Kelly requested an attorney to represent him in an action setting aside a proposed merger between Maple Leaf Development Corporation and Tree Farm Development Corporation.

b. After the attorney received their requested $5,500.00 retainer, the attorney failed to timely file the complaint even after Maple Leaf informed the attorney that a delay would cost Maple Leaf $5,000.00 each month. It took the attorney four months to file and eight months to have any motion heard.

c. After the complaint was filed and served, Maple Leaf's attorney refused to have a default entered after 20 days expired from service of the summons even though Jack David Kelly (Maple Leaf Development) instructed him to do so in the beginning. He promised that he would, saying "absolutely", and when he did not, Maple Leaf demanded that the default be entered as previously instructed and promised to do, and he refused.

d. The Attorney prepared no memo for the court to consider at the motion hearing.

e. One hearing was held for approximately twenty minutes including the time consumed for telephone conferences with the opposing counsel, Carl R. Pennington, Esquire, of Tallahassee Florida, and Philip

Bates, Esquire, of Pensacola, Florida, who did not personally appear. After the hearing the judge ordered that the case be heard in Escambia County Florida, rather than in Leon County Florida.

f. The attorney refused to appeal the change of venue even though he was instructed to and promised that he would without Maple Leaf paying an additional $5,000.00, not withstanding the fact that the attorney had previously been paid $5,500.00 as a retainer and was under contract to continue the case on an hourly basis.

5. The attempt to collect additional attorney fees appeared to Maple Leaf as an unlawful attempt to extract additional funds in view of the minimal work completed by the attorney in exchange for the amount that had been paid per the contract.

6. The Motion to Withdraw proceedings and the evidence sought to be presented but denied is necessary for this Honorable Court to consider in resolution of this appeal.

/s/ Burton E. Strubhar
BURTON E. STRUBHAR
3298 Summit Blvd., Suite 31B
Post Office Box 30215
Pensacola, FL 32503
(904) 432-7001
Fla. Bar No. 176414
Attorney for Appellant

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Motion to Supplement the Record on Appeal has been furnished to Phillip A. Bates, Esquire, 125 W. Romana Street, Suite 800, Post Office Box 13010, Pensacola, Florida 32501; Stephen R. Moorehead, Esquire, 700 South Palafox Street, Suite 3c, Pensacola, Florida 32501; Carl R. Pennington, Esquire, 3375 Capitol Circle, P.O. Box 13527, N.E., Tallahassee, Florida 32317; Emory O. Williams, Esquire, 306 Third Lane, Palm Beach Gardens, 33410; Estate of George G. Phillips, Jr. Esquire, ___ by U.S. Mail this 13th day of August, 1991.

/s/ Burton E. Strubhar
BURTON E. STRUBHAR

Exhibit 1

IN THE CIRCUIT COURT FOR THE
SECOND JUDICIAL CIRCUIT, IN
AND FOR LEON COUNTY, FLORIDA

JACK D. KELLY, etc.,

Plaintiff,

vs.

TREE FARM DEVELOPMENT CORP., et al.,

Defendants.
_____/

CASE NO:
90-3398

ORDER GRANTING MOTION TO WITHDRAW

THIS CAUSE having come to be heard on the motion of attorney, Albert C. Penson, to withdraw as counsel for JACK D. KELLY, individually and JACK D. KELLY as President/Shareholder of Maple Leaf Development Corp., and the Court having reviewed the motion and the file and having found that JACK D. KELLY, individually and JACK D. KELLY as President/Shareholder of Maple Leaf Development Corp., is presently represented by counsel and the court being otherwise advised in the premises, it is hereby

ORDERED AND ADJUDGED that the motion of Albert C. Penson, to withdraw is hereby granted.

DONE AND ORDERED this 1st day of August, 1991, nunc pro tunc, in Chambers at Tallahassee, Leon County, Florida.

/s/ J. Lewis Hall Jr
J. LEWIS HALL, JR.
Circuit Judge

Copies to:

Albert C. Penson, Esquire
Philip A. Bates, Esquire
Stephen R. Moorhead, Esquire
Carl R. Pennington, Jr., Esquire
Emory O. Williams, Jr., Esquire
Burton E. Strubhar, Esquire
Jack D. Kelly

Exhibit 2

IN THE CIRCUIT COURT OF THE
SECOND JUDICIAL CIRCUIT, IN
AND FOR LEON COUNTY, FLORIDA

JACK D. KELLY,

Plaintiff,

vs.

CASE NO.:
90-3398

TREE FARM DEVELOPMENT
CORPORATION,

Defendant.

_____/

Transcript of hearing held before the Honorable J. Lewis Hall, Jr., at Leon County Courthouse, Tallahassee, Florida, on Thursday, August 1, 1991, commencing at 9:30 a.m. Reported by Jo Langston, Court Reporter and Notary Public.

MERIT REPORTING
Post Office Box 1496
Tallahassee, Florida 32302
(904) 224-6262

[p. 2] APPEARANCES

FOR THE PLAINTIFF: BURTON E. STRUBHAR,
ESQUIRE
Attorney at Law
3298 Summit Boulevard
Pensacola, Florida 32503

FOR THE DEFENDANT: ALBERT C. PENSON, ESQUIRE
Attorney at Law
701 East Tennessee Street
Tallahassee, Florida 32308

ALSO PRESENT: JACK DAVID KELLY
DEAN KOWALCHYK, ESQUIRE

[p. 3] THURSDAY, AUGUST 1, 1991, TALLAHASSEE, FLORIDA, 9:30 A.M.

-0-

THE COURT: I show on my little printout here that this is on a motion to withdraw.

MR. PENSON: That's correct, Judge.

THE COURT: I've not run across too many controversial motions for leave to withdraw. What is the problem?

MR. PENSON: Judge, I filed a motion to withdraw, essentially setting forth five reasons. All other counsel in the case have consented to the withdrawal. I sent Mr. Kelly a consent with regard to withdrawal. He did not sign the consent and instead filed an answer to my motion denying the allegations in my motion.

There's five – essentially five separate allegations forming the basis for my motion to withdraw. The first one regards ineffective communication with Mr. Kelly regarding the handling of his case, and that pertains mostly to telephone conversations that I had with him, followed up by written confirmation, followed up by subsequent telephone conversations in which the position

has changed, followed by a subsequent written communication, and it seemed that he and I were going [p. 4] in one direction on day one, and on day two we would go at a different direction. The inability to communicate is also found with regard to my inability to obtain certain information that I requested from him early on in the case so that I felt that I could proceed.

Then the third reason stated is noncompliance with our fee agreement. We have a signed fee agreement. Mr. Kelly is in substantial default with regard to that fee agreement.

The fourth allegation in my motion is that there's absolutely no prejudice to him at this stage of the proceedings. The parties haven't even answered, other than by filing their motions, which are now on appeal. I had alleged that Mr. Kelly had consulted with other counsel and was either representing himself in the appeal or had counsel representing him. It turns out that Ms. Caino (phonetic), who was originally representing him, is no longer in the appeal and Mr. Strubhar is. And, so, he has competent representation, you know, on the appeal at least.

I had written Mr. Kelly and indicated that I was not going to handle the appeal except under certain conditions. He did not meet the conditions and hired [p. 5] other counsel. I then also wrote him and told him that my only obligation would be to continue in the case if he abided by the other conditions of our fee agreement and we were able to effectively communicate. We haven't been able to do that. So, I move to withdraw.

THE COURT: Do you represent Mr. Kelly?

MR. STRUBHAR: Yes, Your Honor.

THE COURT: Are you representing him in this action at the appeals level?

MR. STRUBHAR: Yes, Your Honor.

THE COURT: Mr. Penson wishes to withdraw.

MR. STRUBHAR: Right.

THE COURT: I can simply say, without regard to any finding with respect to the allegations, Mr. Kelly is now represented by other counsel, make no finding with respect to the allegations, and give leave to withdraw.

MR. STRUBHAR: Judge, our position was only that Mr. Kelly retained him to represent him and paid him $1,000 and a $5,000 –

THE COURT: That's another matter, as far as I'm concerned.

MR. STRUBHAR: Right. But he alleged in the motion –

[p. 6] THE COURT: That's why I make no finding, which I don't think would be binding anyhow in the event of subsequent litigation or dispute over those issues. If you represent Mr. Kelly, I'll simply make a finding of record that Mr. Kelly is presently represented by other counsel and that Mr. Penson is given leave to withdraw.

MR. STRUBHAR: Judge, can the record reflect that we do contest those allegations, that they're not true and that it will be brought up in another proceeding.

THE COURT: Well, you've already filed an answer denying them.

MR. STRUBHAR: Right.

THE COURT: So, I don't need to have any other grounds. As far as this decision is concerned, the allegations or any finding with respect to them is moot. Your own record is denying them.

MR. STRUBHAR: Sure, certainly. We had evidence to show the reason that we denied them. And we're saying here that you don't need to hear that or it's not relevant to this hearing.

THE COURT: No. If he's represented by counsel of his choice, then I don't need to go into anything else.

MR. PENSON: Judge, I'll prepare an order that [p. 7] has a finding that Mr. Kelly is represented by other counsel, and on that basis, leave to withdraw is granted.

(Whereupon, the hearing was concluded.)

CERTIFICATE

STATE OF FLORIDA)
COUNTY OF LEON)

I, Jo Langston, County Reporter and Notary Public at Leon County, Tallahassee, Florida, do hereby certify that the foregoing pages 3 through 7, both inclusive, comprise a true and correct transcript of the proceedings; that said

proceedings were taken by me stenographically and transcribed by me as it now appears; that I am not a relative or employee or attorney or counsel of the parties, or a relative or employee of such attorney or counsel, nor am I interested in this proceeding or its outcome.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal this this [sic] 2nd day of August, 1991.

/s/ Jo Langston
Jo Langston, Court Reporter
and Notary Public,
State of Florida at Large.

My Commission Expires: 6/6/93.

Supreme Court, U.S.
FILED
SEP 21 1992
OFFICE OF THE CLERK

No. 92-327

In The

Supreme Court of the United States

October Term, 1992

JACK DAVID KELLY, Individually and
JACK DAVID KELLY, as President/Shareholder of
MAPLE LEAF DEVELOPMENT CORPORATION,

Petitioner,

versus

TREE FARM DEVELOPMENT CORPORATION; EMORY O. WILLIAMS, JR.; GEORGE G. PHILLIPS, JR.; E.D. BOB PIERCE; and THE ESTATE OF ABRAHAM L. PIERCE,

Respondents.

Petition For Writ Of Certiorari To The Supreme Court Of Florida

REPLY TO RESPONDENTS' BRIEF IN OPPOSITION TO THE PETITION FOR CERTIORARI

BURTON E. STRUBHAR, Esq.
3298 Summit Blvd.,
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Attorney for Petitioner

JACK DAVID KELLY
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REPLY TO ARGUMENT I.

In the Respondents' Brief in Opposition to the Petition for Writ of Certiorari under Argument I., they erroneously represented to this Court that the Order of the Circuit Court of Leon County, Florida, transferring Petitioner's case to another jurisdiction is not final and, therefore, this Court does not have jurisdiction to hear a non-final order.

The order is unquestionably final as to the fundamental rights of Petitioner with regard to what court he can bring his action to set aside the merger. The order *terminated* Petitioner's right to due process, the most fundamental right to have his grievance addressed in the proper court of his choosing. The order not only terminates Petitioner's rights of due process, but has come about through the mislabeling of Petitioner's original Complaint as an action involving real property while ignoring the true fact that the Complaint is an action to set aside a merger of two corporations.

There can be no clearer example of finality than the facts of this case, the termination of Petitioner's constitutional rights. Petitioner has been denied access to the proper court of his choosing. There can be no clearer denial or "Final Judgment or Decree" stripping Petitioner of his rights to due process of law guaranteed by the Fourteenth Amendment.

REPLY TO ARGUMENT II.

In the Respondents' Brief in Opposition to the Petition for Writ of Certiorari under Argument II., they argue that the petition for the writ was not timely filed.

The record clearly reflects that a timely request for extension was requested by Petitioner and it was granted by this Court.

The substance of Respondents' arguments put forth the preposterous position that time should start for filing the petition to the Supreme Court from the date that the State District Court of Appeal renders a final decision, and not the date when the State Supreme Court renders its final decision. This reasoning by Respondents reveals the reckless disregard that Respondents have for allowing a citizen to exercise his rights to have his wrong redressed in the proper court in a timely manner.

If this Court accepts Respondents' argument and/or reasoning, it would be best to change the procedural rules of this Court so that citizens seeking redress of violations committed against them, will know that the time for bringing a Petition for Writ of Certiorari to the United States Supreme Court starts running from the date of the final decision of the State District Court of Appeal, if that court rendered its opinion *"per curiam*, affirmed". This reasoning would further lead to the bypassing of the State's highest court under these factual circumstances which would deny or have the effect of denying that court of its inherit rights under the Constitution to review the District Court of Appeal's decision.

REPLY TO ARGUMENT III.

In the Respondents' Brief in Opposition to the Petition for Writ of Certiorari under Argument III., Respondents attempt to couch Petitioner's question presented to this Court as not being a substantial federal question. The question presented to this Court could not be more substantially federal in its question presented. The question involves the fundamental rights of a citizen to chose the proper forum to redress his wrongs.

Under the facts of the instant case, a Florida court in Leon County, Florida improperly denied a citizen of the State of Florida the right to have his case heard in the proper court. The Florida judge has improperly labeled Petitioner's case as a case involving real property and, therefore, transferring the case to another jurisdiction. This false labeling of Petitioner's case was wrong as is shown by the pleadings and subsequent appeals made by Petitioner. (See also Appendix A-8 and A-9 of Petitioner's Original Brief). A lower state court judge cannot and shall not deny a citizen of his rights under the United States Constitution to bring his action to the proper court of his choosing. What more substantial federal question could be involved?

In Respondents' brief on page 12, they attempt to downplay the substantial federal question issue that Petitioner has brought to this Court. Respondents state:

> "All that has occurred is a ruling that the (Petitioner's) case should not have been filed in Leon County . . . " and "Petitioner is not being denied a right to seek his remedy . . . "

Petitioner is most certainly being denied his rights to seek a remedy in the proper court of his choosing. This right is being denied by the erroneous labeling of Petitioner's original complaint, as shown in the aforesaid letters reproduced in Appendix A-8 and A-9.

The Supreme Court has no common law jurisdiction and it can only exercise the jurisdiction prescribed by the Constitution. Jurisdiction exists in this case due to the state's violation of a citizen's constitutional rights. Article III, Section 2, United States Constitution.

As guardian of the Constitution, this Court has inherently been vested with jurisdiction to ensure that Petitioner has the right to have his grievance addressed in the proper court which will guarantee him the protection of his Constitutional rights.

In accordance with the above and the initial brief of Petitioner, Petitioner humbly and sincerely prays that his Court will permit him to present his case before the highest Court in the Country.

Respectfully submitted,

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